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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

POLICE DEPARTMENT OF THE CITY OF CHICAGO, *et al.*, *Petitioners*, v. EARL D. MOSLEY, *Respondent.*	No. 70-87 CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT
	CONSOLIDATED
RICHARD GRAYNED, *Appellant*, v. CITY OF ROCKFORD, *Appellee.*	No. 70-5106 APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINIONS

The opinion of the United States Court of Appeals, Seventh Circuit, in *Mosley v. Police Department of the City of Chicago, et al.*, is reported at 432 F.2d 1256 (1970).

[1] These cases were consolidated by this Court's order of October 12, 1971. Because the two courts below reached contrary conclusions and because there was no special order of this Court as to the briefing requirements, we have assumed that they are the same in each case as they would have been if there had been no consolidation.

The opinion of the Illinois Supreme Court in *City of Rockford v. Grayned*, is reported at 46 Ill. 2d 486, 263 N.E.2d 866 (1970) (A. 22)..

JURISDICTION OF THIS COURT

Richard Grayned was convicted on October 7, 1969, in the Circuit Court of Winnebago County, Illinois, of having violated two ordinances of the City of Rockford on April 25, 1969. In accordance with then applicable rules of the Supreme Court of Illinois, he appealed that conviction directly to that court, charging that those ordinances were repugnant to the Constitution and laws of the United States and urging that his conviction be reversed. On or about September 29, 1970, the Illinois Supreme Court upheld the validity of the ordinances and affirmed Grayned's conviction (A. 27). His petition for rehearing addressed to that court was denied on or about December 3, 1970. (R. Item 10).

On the application of appellant, Mr. Justice Marshall of this Court extended the time within which to docket this appeal to April 12, 1971. On or about April 8, 1971, appellant filed a jurisdictional statement invoking the jurisdiction of this Court conferred by 28 U.S.C. § 1257(2), relying upon this Court's construction of that statutory provision in *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277 (1958), and *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S. Ct. 894 (1949). This Court noted probable jurisdiction on October 12, 1971. On the same day a writ of certiorari was issued in the *Mosley* case.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

A. Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. **Constitution of the United States, Amendment XIV:**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. **Ill. Rev. Stats.** (1969), Ch. 24, § 1-2-1. *"Ordinances and rules to execute powers—Limitations on punishments.*

"The corporate authorities of each municipality may pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper. No fine or penalty, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall exceed $500 and no imprisonment authorized in Section 1-2-9 for failure to pay any fine, penalty or cost shall exceed 6 months for one offense."

D. **Code of Ordinances of the City of Rockford, Illinois:**

1. Section 18.1:[2]

"A person commits disorderly conduct when he knowingly:

* * * * *

"(i) Pickets or demonstrates on a public way within 150-feet of any primary or secondary school

[2]As a result of a recent recodification of Rockford ordinances (November 30, 1970, effective December 8, 1970) these provisions which will usually be referred to hereinafter as the "Anti-picketing or demonstration ordinance" are now § 19-13(i) and (j), but § 18.1(k) was repealed. § 19.2(a), *infra*, which will usually be referred to hereinafter as the "Anti-noise or diversion ordinance," is now §§ 19-15 and 19-16. Section 1-8 *infra*, was revised to provide for fines of from five ($5) to five hundred ($500) dollars only. Section 1-9 infra is the same as it has been since its adoption in 1936.

building while the school is in session and one-half hour before the school is in session and one-half hour after the school session[3] has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; or

"(j) Pickets or demonstrates on a public way within 150 feet of any church, temple, synagogue or other place of worship while services are being conducted and one-half hour before services are to be conducted and one-half hour after services have been concluded, provided that this subsection does not prohibit the peaceful picketing of any church, temple, synagogue or other place of worship involved in a labor dispute.

"(k) A person convicted of disorderly conduct shall be fined not less than $5.00 nor more than $500.00 for each offense . . ."

2. Section 19.2(a). Schools.

"That no person not a student or employee of any school located in the City of Rockford, or parent or guardian of any student enrolled therein, shall remain within any school during normal school hours without securing the written permission of the principal or person in charge of said school.

"The term 'student' as used herein is hereby defined as any person of school age and enrolled in the school at which he or she then is present.

"That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. And when school premises are used for any gathering or

[3]The ordinance of the City of Chicago involved in *Police Department, etc., et al. v. Mosley*, supra, consolidated herewith, is the same except that this word "session" is omitted at this point from the Chicago ordinance.

function during the day or nighttime, no person will willfully assist in the making of any noise or diversion which disturbs or tends to disturb the peace, quiet or good order of such gathering or function."

3. Section 1-8. General Penalty; continuing violations; adjudging fines and imprisonments.

"It shall be unlawful for any person to violate or fail to comply with any provision of this Code and where no specific penalty is provided therefor, the violator shall be punished by a fine of not less than ten dollars and not exceeding two hundred dollars or imprisonment for a term not exceeding six months or by both such fine or imprisonment, however, except civil penalties provided for failure to make returns or to pay any taxes levied by the municipality shall exceed two hundred dollars and no imprisonment shall exceed six months for one offense."

4. Section 1-9. Imprisonment.

"Any person upon whom any fine or penalty shall be imposed for the violation of any laws or ordinances of the city may, upon the order of the court before whom the conviction is had, be committed to the city jail or such other place as may be hereafter provided for the incarceration of such offenders until such fine, penalty and costs shall be fully paid; provided that no such imprisonment shall exceed six months for any one offense."

QUESTION PRESENTED FOR REVIEW

Do the Rockford ordinances, and his conviction for violation of them, deprive appellant, and threaten to deprive others similarly situated, of rights of freedom of speech, freedom of assembly, due process, and equal protection of the laws all in violation of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

The appellant, Richard Grayned, a Negro, was arrested along with approximately forty (40) other males of about

two hundred (200) persons, both black and white, male and female, who were participating in a noon-time demonstration in front of Rockford's West High School. The demonstrators, walking peacefully on the public sidewalk within one hundred and fifty (150) feet of the school carrying signs, sought addition of courses in Negro history; hiring of more Negro teachers; use of black student cheer leaders; and protested discriminatory treatment of black students and lack of representation of black students in school organizations, all at that school. The demonstrators included students, former students, parents of students and other concerned citizens. Grayned, himself, was not a student at the time of his arrest.

Originally Grayned was charged with violating the "Anti-noise or diversion ordinance." It had been adopted less than a month prior to this demonstration after public controversy had developed concerning the alleged discrimination against Negro students in West High School. Later, the complaint against the appellant was amended to add a charge of violating the "Anti-picketing and demonstration ordinance" which had been adopted in 1956. (A. 1-3).

Counsel for Grayned moved to quash the complaint as amended on the ground that these ordinances denied defendant rights protected by the Fourteenth Amendment. In addition, counsel charged that the ordinance authorizing imprisonment for violation of the newly adopted "Anti-noise and diversion ordinance" was void because it exceeded the authority of the municipality. The motion to quash was denied. On a trial before a jury, the judge instructed the jury as to the offenses charged in the exact language of the ordinances. Upon the return of a verdict of guilty on both charges, counsel for Grayned moved to set aside the verdict on the grounds that the evidence did not sustain the verdict and that the ordinances and the conviction denied rights to Grayned protected by the Fourteenth Amendment, particularly freedom of speech, freedom of assembly, due process of law, and equal protection of the laws. The post-trial

motions were denied and Grayned was fined $25.00 on each charge. (A. 4-19).

On direct appeal to the Illinois Supreme Court in accordance with its rules then applicable, the federal constitutional issues were again raised. In addition, counsel for Grayned again charged that §1.8 of the Rockford ordinances, supra, in authorizing imprisonment for a violation of the "Anti-noise or diversion ordinance" exceeded the statutory authority of the City of Rockford.

The Supreme Court of Illinois, one justice dissenting, affirmed the conviction of Grayned and sustained the validity of the Rockford ordinances involved except that the Illinois Supreme Court ruled that the penal provision of §1.8 was beyond the power of the City of Rockford in providing for imprisonment. The court was of the view, however, that the penal ordinance was "severable" and sustained the imposition of a fine on Grayned. (A. 22).

Contemporaneously with the attack by Grayned on the Rockford ordinances, an effort was being made in the United States District Court for the Northern District of Illinois to restrain enforcement of the Chicago "Anti-picketing and demonstration ordinance" which, except for one immaterial word, is exactly the same as the Rockford "Anti-picketing and demonstration ordinance." (See p. 4, supra). A few days after the announcement by the Illinois Supreme Court of its decision affirming Grayned's conviction, the Court of Appeals for the Seventh Circuit ruled in *Mosley v. Police Department of the City of Chicago*, supra, that enforcement of the Chicago "Anti-picketing and demonstration ordinance" should be enjoined because it threatened Mosley with denial of freedom of speech protected by the Fourteenth Amendment. That court was of the view that the City of Chicago ordinance was "overbroad" and that Mosley's right to picket in the public way could not be denied "where there is no danger of interference with a valid state interest."

The decision in *Mosley* was called to the attention of the Supreme Court of Illinois by petition for rehearing. In deny-

ing that petition that court made no comment concerning the ruling of the Court of Appeals in *Mosley*. (A. 22-29).

SUMMARY OF ARGUMENT

A. The Rockford "Anti-picketing and demonstration ordinance" and the "Anti-noise or diversion ordinance" are invalid because they punish efforts to exercise the right to speak, peaceably to assemble, and peaceably to petition the government for redress or grievances, all being rights protected against state interference by the Fourteenth Amendment to the Constitution of the United States.

B. These Rockford ordinances are invalid because they are unconstitutionally vague in that they do not define the meaning of the terms "pickets or demonstrates"; and the test of whether "noise or diversion . . . disturbs or tends to disturb the peace or good order" of a school is based on the sensitivity of some unidentified person or persons.

C. The "Anti-picketing and demonstration ordinance" violates the Equal Protection clause of the Fourteenth Amendment because it permits peaceful picketing of a school only when it is involved in a labor dispute and that classification does not serve any compelling governmental interest.

For all of the foregoing reasons, appellant's conviction deprives him of rights protected by the Constitution of the United States and the conviction should be set aside.

ARGUMENT

A. THESE ROCKFORD ORDINANCES ARE INVALID BECAUSE THEY PUNISH EFFORTS TO EXERCISE THE RIGHT TO SPEAK, TO ASSEMBLE, AND TO PEACEABLY PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES ALL BEING RIGHTS PROTECTED AGAINST STATE INTERFERENCE BY THE FOURTEENTH AMENDMENT.

The first charge against appellant was that in violation of the "Anti-noise or diversion ordinance":

> "While on school ground and while school was in session, (appellant) did wilfully make and assist in the making of a diversion which tended to disturb the peace in (sic) good order of the school session and class thereof." (A. 1).

The second charge was that in violation of the "Anti-picketing and demonstration ordinance" appellant:

> "Picketed or demonstrated on a public way within one hundred fifty (150) feet of a secondary school building while the school was in session and that said subject was not picketing with regards to any labor dispute." (A. 2).

Appellant pleaded not guilty to both charges.

The circumstances of the conduct complained of by the City of Rockford are clear. The appellant, Richard Grayned, a Negro, was arrested along with approximately forty (40) other males of about two hundred (200) persons, both black and white, male and female, who were participating in a noon-time demonstration in front of Rockford's West High School. The demonstrators, walking peacefully on the public sidewalk within one hundred and fifty (150) feet of the school, carrying signs, sought addition of courses in Negro history to the school's curriculum; hiring of more Negro teachers at the school; use of black student cheer leaders; and protested discriminatory treatment of black students in school organizations, all at that school. The demonstra-

tors included students, former students, parents of students and other concerned citizens.

The Supreme Court of Illinois pithily summarized the facts by observing that:

> "On April 25, 1969, a demonstration was held in front of a high school in the City of Rockford. Richard Grayned, the defendant here, and 40 other demonstrators were arrested." (46 Ill.2d 492, 493, 263 N.E.2d 866, 867.)[4]

In affirming the conviction of appellant the Supreme Court of Illinois obviously construed the ordinances in question as prohibiting appellant and others from peacefully exercising "methods of expression entitled to First Amendment protection," *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 152, 89 S.Ct. 935, 939 (1969). Nevertheless the Illinois court ruled that these ordinances were valid because, they said:

> "It cannot be doubted that the State has a legitimate interest in preserving the peace and good order of its school system . . .
>
> Our conclusion here is that the ordinance in question on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring

[4]There has been no substantial conflict as to the facts in this case. The record before this Court, however, does not include a verbatim transcript of the proceedings at the trial though they were recorded by a court reporter. In perfecting the appeal to the Illinois Supreme Court counsel for appellant did not order the notes transcribed because of appellant's lack of funds. Prosecution for violation of municipal ordinances in Illinois is deemed to be "quasi-criminal" in nature so that the procedure followed is generally that followed in civil cases, not that followed in criminal cases. See *Village of Park Forest v. Bragg*, 38 Ill. 2d 225, 230 N.E.2d 868 (1967); and *Village of Maywood v. Houston*, 10 Ill. 2d 117, 139 N.E.2d 233 (1957). Thus there is no provision under the Illinois practice for furnishing a transcript of the proceedings at a trial for violation of a municipal ordinance to an indigent defendant at the expense of the state. Cf.

with it constitutional protection.' (Cf. *Cox v. Louisiana*, 379 U. S. 559, 564, 85 S.Ct. 476, 481, 13 L.Ed.2d 487, 492)." (46 Ill.2d 492, 494, 263 N.E.2d 866, 867-868.)

In so ruling, the Illinois Supreme Court, we respectfully submit, misapprehended the state of the law and the applicable authorities because this Court has never condoned indiscriminate prohibition of the exercise of Fourteenth Amendment rights no matter what state interest was claimed.

In the *Cox* case relied on to sustain these Rockford ordinances, for clarity hereinafter usually referred to as the second *Cox* case, this Court emphatically approved a state statute punishing picketing in or near a building housing a courthouse,

> * * * "with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in the exercise of his duty . . . ." LSA Rev. Stat. §14:401 (Cum. Supp. 1962).

In its opinion the determinative features of that case which distinguish it from the instant case were pointed out when this Court said:

> "There can be no question that a State has a legitimate interest in protecting its judicial system from

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Griffin v. People of State of Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956), and *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). On motion of appellant the Supreme Court of Illinois waived its requirement that excerpts of the record or an abstract be filed because counsel for appellant believed that the relevant portions of the record could adequately be set forth in appellant's brief in the Illinois Supreme Court and so represented to that court. That court apparently did not regard a trial transcript as necessary for decision of the federal constitutional issues raised. Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689 (1971).

This Court has permitted appellant to proceed *in forma pauperis*, but it is not clear that federal funds are available to pay for a transcript of the proceedings of the trial. See Rule 53(6) of the Rules of this Court.

the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See Wood v. Georgia, 370 U.S. 375, 383, 82 S.Ct. 1364, 1369, 8 L.Ed.2d 569. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' Rideau v. Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See Frank v. Mangum, 237 U.S. 309, 347, 35 S.Ct. 582, 595; 59 L.Ed. 969. (Holmes, J., dissenting). *A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the state's interest in assuring justice under law.*" (379 U.S. 559, 562-563, 85 S.Ct. 476, 479-480 (1964). (Emphasis supplied).

In basing its decision on that second *Cox* opinion the Illinois Supreme Court apparently failed to notice that even there, though this Court was of the opinion that the *statute* was valid because it was "narrowly drawn" to protect the "legitimate interest" of the State, the *conviction* of peaceful demonstrators for violating even that valid, narrow statute was not valid. This, apparently, because they were on the public sidewalk between 101 and 125 feet from the courthouse where the sheriff had said they might conduct their demonstration.

The second *Cox* opinion contains no warrant for the gross invasion of individual rights involved in the instant case. In that *Cox* case this Court upheld a narrowly drawn statute specifically aimed at protecting judges, jurors, witnesses and court officer from intentional and deliberate intimidation. No serious argument has been offered to justify constitutional protection for such conduct. In contrast, these broad Rockford ordinances punish exercise of First Amendment rights without regard to the intention of the citizen who, in this case, sought no more than peacefully to voice his grievances and those of his fellow citizens.

The nature of the state interest these ordinances claim to protect warrants no such invasion of constitutional rights. The Illinois Supreme Court characterized that interest as "preserving the peace and good order of its school system," supra, at page 10. Even that laudable purpose, however, will not validate ordinances so broad that they punish the use of the streets and public places for peaceful communication of views.

This Court has ruled that prohibition by school officials of symbolic conduct which was an expression of students' opinion in the school itself, including classrooms, was unconstitutional. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514, 89 S.Ct. 733, 740 (1969). There this Court held that in absence of the demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities, or any showing that disturbances or disorders on school premises in fact occurred when students wore black arm bands on their sleeves to exhibit their disapproval of Vietnam hostilities, a regulation prohibiting wearing such arm bands at school and providing for suspension of any student refusing to remove such an arm band, was an unconstitutional interference with the students' Fourteenth Amendment rights of expression of opinion.

It would appear to be impossible, then, in light of the *Tinker* case to justify ordinances so broad they punish peaceful expression of views *outside* the school when such expres-

sion *inside* the school falls within the protected orbit of freedom of communication of ideas. Significantly, the *Tinker* case, supra, is not an isolated, single decision. To the same effect in limiting the power of the state to interfere with Fourteenth Amendment rights in the conduct of public schools, see *Keyishian v. Board of Regents of U. of St. of N.Y.*, 385 U.S. 589, 87 S. Ct. 675 (1967); and *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247 (1960).

In relying for a basis for its decision solely on the second *Cox* case the Illinois Supreme Court ignored the other *Cox* opinion rendered by this Court on the same day, *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453 (1965), hereinafter usually referred to as the first *Cox* case. In that decision this Court struck down as violating rights of free speech and free assembly broad Louisiana statutes, like the ordinances here, prohibiting "disturbing the peace," and "obstructing public passages," when they were construed as prohibiting peaceful demonstrations protesting racial segregation and discrimination at the state capitol and near the courthouse.

Unfortunately, the Illinois Supreme Court also ignored an unbroken line of decisions by this Court over more than thirty years that these First Amendment rights, protected from interference by the states by the Fourteenth Amendment, may not be abridged or denied under the guise of regulation for the general good. Indeed, the soundness of the views first expressed by Mr. Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515-516, 59 S. Ct. 954, 964 (1939), has never been questioned. There he said:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views

> on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order; *but it must not, in the guise of regulation, be abridged or denied.*" (Emphasis supplied)

For the convenience of Court and counsel, instead of reviewing all of the decisions in this brief, the attention of the Court is respectfully directed to the detailed account and the incisive, in-depth analysis of the opinions of this Court on this subject from *Hague*, supra, to *Cox*, supra, in Kalven, *"The Concept of the Public Forum: Cox v. Louisiana,"* The Supreme Court Review, 1965, p. 1.

Most significantly, in those cases not even a single justice of this Court ever approved any such municipal denial of freedom of speech, assembly and petition for redress of grievances as is the result of the conviction in the instant case. See *Amalgamated Food Employees Union Local 590, et al., v. Logan Valley Plaza, Inc., et al.*, 391 U.S. 308, 313-314, 88 S.Ct. 1601, 1605-1606 (1968).

In *Shuttlesworth v. City of Birmingham*, supra, 394 U.S. at 152, 89 S.Ct. at 939, in a context similar to that of the instant case, Mr. Justice Stewart for a majority of the Court recently quoted those views of Mr. Justice Roberts' with approval, prefacing the quotation with the observation that:

> "It is argued, however, that what was involved here was not 'pure speech,' but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that 'the First and Fourteenth Amendments (do not) afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' *Cox v. Louisiana*, 379 U.S. 536, 555, 85 S. Ct. 453, 464, 13 L. Ed.2d

471. 'Governmental authorities have the duty and responsibility to keep their streets open and available for movement.' Id., at 554-555; 85 S.Ct., at 464.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. *Cox v. Louisiana*, supra; *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed.2d 697; *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093."

In the *Shuttlesworth* case this Court observed:

"There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." (394 U.S. at 150, 89 S. Ct. at 938).

The Birmingham ordinance held invalid in *Shuttlesworth* was a "licensing" ordinance so that theoretically, a "license" could have been given to permit some use of the public way for some exercise of freedoms of speech, demonstration, and assembly. The Rockford ordinances thus are substantially worse than the Birmingham ordinance held to be invalid, because the Rockford ordinance makes no provision for "license" or "permit," and only the whim or caprice of police officers in not arresting and charging persons picketing or demonstrating would allow use of Rockford streets for purposes historically protected by the Constitution and Court of the United States.

What the City of Rockford has done, and what the Supreme Court of Illinois has approved, is to convict appellant of a crime, and to fine him, for using the public way for protesting racial discrimination in the very school outside which he and his associates conducted their peaceful demonstration. This Court has never approved any such broadside state interference with the exercise of First Amendment rights. On the contrary this Court has assiduously protected such rights. See *Nietmotko v. Maryland*, 340 U.S.

268, 71 S. Ct. 325 (1951); *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248 (1961)*[5]; *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963)*; *Fields v. South Carolina*, 375 U.S. 44, 84 S. Ct. 149 (1963)*; *Henry v. City of Rock Hill*, 376 U.S. 776, 84 S. Ct. 1042 (1964)*; *Brown v. Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966)*; *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453 (1965)*; *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476 (1965)*; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969)*; *Gregory v. City of Chicago*, 394 U.S. 111, 89 S. Ct. 946 (1969)*; *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575 (1971)*; *Coates v. City of Cincinnatti*, 402 U.S. 611, 91 S. Ct. 1686 (1971); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780 (1971).

Appellant charges that the Rockford ordinances are void for "overbreadth." This Court said of a similar attack in *Zwickler v. Koota*, 389 U.S. 241, 250, 88 S.Ct. 391, 396 (1967), the following:

> "(Appellant's) constitutional attack is that the statute . . . is void for 'overbreadth,' that is, that it offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307, 84 S. Ct. 1302, 1314, 12 L. Ed.2d 325. See *Aptheker v. Secretary of State*, 378 U.S. 500, 508-509; 84 S. Ct. 1659, 1665, 12 L. Ed.2d 992; *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed.2d 405; *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 81 S. Ct. 1333, 6 L. Ed.2d 301; *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5

[5]In cases so marked this Court specifically ruled that the right to use public streets and sidewalks to protest racial discrimination and segregation was protected against state interference by the Fourteenth Amendment. See also *Davis v. Francois*, 395 F.2d 730 (C.A. 5th, 1968).

L. Ed.2d 231; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246, 77 S. Ct. 752, 760, 1 L. Ed.2d 796; *Martin v. City of Struthers*, 319 U.S. 141, 146-149, 63 S. Ct. 862, 864-866, 87 L. Ed. 1313; *Cantwell v. State of Connecticut*, 310 U.S. 296, 304-307, 60 S.Ct. 900, 904, 84 L.Ed. 1213; *Schneider v. State of New Jersey*, 308 U.S. 147, 161, 165, 60 S.Ct. 146, 152, 84 L.Ed. 155."

Later decisions of this Court are to the same effect. See *United States v. Robel*, 389 U.S. 258, 265-266, 88 S. Ct. 419, 424 (1967); *Shuttlesworth v. City of Birmingham*, supra, 394 U.S. at 153, 89 S. Ct. at 940; *Coates v. City of Cincinnati*, supra, 402 U.S. at 614, 91 S.Ct. at 1688.

In the instant case under the guise of regulation, Rockford (and Chicago) punish efforts to exercise First Amendment rights. The subjects of the ordinances, i.e., regulation of the use of public streets and sidewalks, and regulation of noise and diversion near public schools appear to be within the ambit of the legislative authority of the municipality. At the same time, however, as in the instant cases, these ordinances by their terms authorize punishment of persons who have done (Grayned), or would do (Mosley), no more than peacefully exercise their rights of freedom of speech, freedom of assembly and petition for redress of their grievances. Thus, these ordinances, in fact, make criminals of those who seek to exercise their First Amendment rights.

It is immaterial whether, in terms of the familiar analysis, see *Shuttlesworth*, supra, p. 15-16, the conduct of appellant is deemed to be "speech pure," "speech plus," or even conduct not involving speech, as farfetched as that would be. Cf. *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968); and *Cowgill v. California*, 396 U.S. 371, 371-373, 90 S. Ct. 613, 614-615 (1970). Both by their terms and as construed by the Illinois Supreme Court, the Rockford ordinances deliberately punish peaceful exercise of First Amendment rights and neither the city nor the Supreme Court of Illinois has demonstrated that any lawful public purpose is, or can be, served by this denial of constitu-

tional rights. As this Court pointed out in the *Amalgamated* case, supra, 391 U.S. at 313-314, 88 S. Ct. at 1606:

> "To be sure, this Court has noted that picketing involves elements of both speech and conduct, i.e., patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. (Citing cases) Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether."

Poverty and lack of control of radio and television stations, newspapers, and even easy access to printed handbills, make the use of public streets and sidewalks for voicing religious, political, and social views of the utmost importance to many of our citizens. See e.g., *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940); *Martin v. Struthers*, 319 U.S. 141, 146, 63 S. Ct. 862, 865 (1943); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, supra. The City of Rockford would deny this means of communication to appellant and all other persons similarly situated. The Supreme Court of Illinois has condoned this gross denial of rights protected by the Fourteenth Amendment of the Constitution of the United States. Accordingly, we respectfully urge this Court to reverse the decision of the lower court, to rule that these Rockford ordinances are unconstitutional, and to set aside the conviction of appellant.

B. THESE ROCKFORD ORDINANCES ARE INVALID BECAUSE THEY ARE UNCONSTITUTIONALLY VAGUE

The provisions of the Rockford ordinances which demonstrate that they violate due process requirements of certainty are:

> 1. "A person commits disorderly conduct when he knowingly. . . *pickets or demonstrates* on a public way within 150 feet of any . . school building while the school is in session. . ."
>
> and
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> 2. "That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of *any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof*. . ." (Emphasis supplied.)

As this Court observed of the Alabama statute involved in *Thornhill v. Alabama*, supra, 310 U.S. at 100-101, 60 S. Ct. at 743-744:

> "The vague contours of the term 'picket' are nowhere delineated.[6] Employees or others, accord-

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[6]See Hellerstein, Picketing Legislation and the Courts (1931), 10 No. Car. L. Rev. 158, 186n.:

> "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a 'scab,' (iii) a trade or employees' boycott,

> ingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute."

Though later decisions have discussed picketing and demonstrations, see e.g., *Cox v. Louisiana*, supra, (both cases), neither in judicial opinions nor otherwise have these terms been defined. In fact, one of the difficulties with the Rockford ordiance is that it was construed by both the trial court and the Illinois Supreme Court as including "peaceful" picketing, thus punishing exercise of First Amendment rights, as we have demonstrated hereinbefore. Under these circumstances, we respectfully submit that ordinance does not meet the requirements of the due process clause as to certainty. See *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618 (1939); *United States v. L. Cohen Grocery Co.* 255 U.S. 81, 41 S. Ct. 298 (1921); and *Cohen v. California*, supra, 403 U.S. at ___, 91 S. Ct. at 1785.

The second ordinance likewise fails to satisfy due process requirements. The vice of the "Anti-noise or diversion ordinance" is that its standard is wholly subjective, i.e., depends upon the judgment of some unidentified person or persons that "any noise or diversion . . . disturbs or tends to dis-

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i.e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

'The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both.'"

turb the peace or good order of such school or class thereof."

Only last term this Court reaffirmed its position that conviction of a statute or ordinance whose standards depended upon the "sensitivity" of unidentified persons did not satisfy the requirements of due process. In *Coates v. Cincinnati*, 402 U.S. 611, 613-614, 91 S.Ct. 1686, 1688, this Court pointed out:

> "Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that 'the standard of conduct which it specifies is not dependent upon each complainant's sensitivity.' Ibid. But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.[3]
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> (1) We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police

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[3]Cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031, where this Court upheld a statute which punished 'offensive, derisive or annoying' words. The state courts had construed the statute as applying only to such words 'as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' The state court also said: 'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. * * * The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.' This Court was 'unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression.' 315 U.S., at 573, 62 S.Ct., at 770.

officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus the ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322."

In the instant case the Illinois Supreme Court was no more helpful than was the Ohio Supreme Court in the *Coates* case. In fact, the Illinois court disposed of this question by reference to earlier decisions by that court, none of which considered this question.

In the *Cohen* case, supra, 403 U.S. at ___, 91 S. Ct. at 1785-1786, this Court further demonstrated the vagueness inherent in a statute dependent for meaning on the sensitivity of persons not plainly identified. If that view protected Cohen's speech it certainly must protect the less colorful speech of appellant.

Taken all together then, we respectfully submit that these ordinances are invalid because they are vague and indefinite and appellant's conviction for violation of them accordingly should be set aside.

C. THE ANTI-PICKETING AND DEMONSTRATION ORDINANCE VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT PERMITS PEACEFUL PICKETING OF A SCHOOL ONLY WHEN IT IS INVOLVED IN A LABOR DISPUTE

The "Anti-picketing and demonstration ordinance" provides in pertinent part:

> "A person commits disorderly conduct when he knowingly:
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> * * * * *
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session . . . , *provided that this subsection does not prohibit a peaceful picketing of any school involved in a labor dispute;* . . ." (Emphasis supplied).

If that exception is read literally, it would permit "the peaceful picketing of any school involved in a labor dispute" no matter what the subject or purpose of the picketing was. So read, then, the conduct of appellant and his associates apparently would not have violated the ordinance if Rockford's West High School had been involved in a labor dispute. There is nothing to suggest that one who "pickets or demonstrates" near a school "involved in a labor dispute" any the less interferes with the "peace and good order" of the school than does one who "pickets or demonstrates" near a school not so involved in a labor dispute.

If the exception is read as permitting only "the peaceful picketing of any school involved in a labor dispute" with respect to that labor dispute, then the ordinance is a municipal determination of what "speech" will be permitted on the public way. For the reasons already discussed hereinbefore, any such municipal regulation would plainly violate the Fourteenth Amendment.

Actually, the permissive exception with respect to the school involved in the labor dispute casts grave doubts on whether the real purpose of the ordinance was, as the Illinois

Supreme Court believed, to preserve "the peace and good order of its school system." (See pg. 11 supra) This exception shows that the purpose of the city, apparently, was to prohibit picketing and demonstrations near schools unless the picketing and demonstration occurred in connection with a labor dispute.

No matter how construed and no matter what its purpose, the "anti-picketing and demonstration ordinance" violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. That this is so was demonstrated by Mr. Justice Black in his concurring opinion in *Cox v. Louisiana*, supra, 379 U.S. at 580-581, 85 S. Ct. at 469-470, where he said:

> "The Louisiana law against obstructing the streets and sidewalks,[2] while applied here so as to convict Negroes for assembling and picketing on streets and sidewalks for the purpose of publicly protesting racial discrimination, expressly provides that the statute shall not bar picketing and assembly by labor unions protesting unfair treatment of union members. I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all. It is worth noting in passing that the objectives of labor unions and of the group led by Cox here may have much in common. Both frequently protest discrimination against their members in the matter of

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[2] LSA-Rev. Stat. § 14:100.1 (Cum. Supp. 1962) provides in relevant part:

> 'No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> 'Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more, favorable wage standards, hours of employment and working conditions. * * *'

employment. Compare *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561, 58 S. Ct. 703, 707, 82 L. Ed. 1012. This Louisiana law opens the streets for union assembly, picketing, and public advocacy, while denying that opportunity to groups protesting against racial discrimination. As I said above, I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited. But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

These views of Mr. Justice Black were cited with approval in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 1083 (1966), where this Court observed:

"We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g., *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113; *Reynolds v. Sims*, 377 U.S. 533, 561-562, 84 S. Ct. 1362, 1381; *Carrington v. Rash*, supra; *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L.Ed.2d 620; *Cox v. State of Louisiana*, 379 U.S. 536, 580-581, 85 S. Ct. 453, 469, 13 L. Ed.2d 471 (Black, J., concurring)."

We respectfully submit that freedom of speech, freedom of assembly, and the right to petition the government for redress of grievances are "fundamental rights and liberties (here) asserted under the Equal Protection Clause." Closely scrutinized, the classification in this case, that is, picketing and demonstration generally, as contrasted with "peaceful picketing . . . in a labor dispute" has not been, and cannot be, "shown to be necessary to promote a *compelling* governmental interest . . .", *Shapiro v. Thompson*, 394 U.S. 618, 636, 89 S. Ct. 1322, 1331 (1969).

Accordingly, we respectfully submit that the anti-picketing and demonstration ordinance is invalid because it violates the Equal Protection Clause to the Fourteenth Amendment and appellant's conviction of violation of that ordinance should be set aside.

CONCLUSION

Violation of the Rockford "Anti-picketing and demonstration ordinance" and the "Anti-noise or diversion ordinance" is now punishable only by fine and appellant was only fined after his conviction of violating those ordinances. The City of Rockford attempted, illegally, to make violation of those ordinances punishable by fine or imprisonment or both. The City had no authority so to do, as the Illinois Supreme Court ruled. But under § 1.9 of the Rockford ordinances, supra, failure to pay a fine even if the failure is the result of the poverty of the defendant, could result in imprisonment. Any such imprisonment might itself be a violation of constitutional rights. See *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970). In any event this combination of penal provisions applicable to these ordinances adds to the enormous "chilling effect" which these ordinances have and will continue to have on the efforts of persons of limited means to express their views with respect to political and social issues which vitally affect them unless this Court strikes down these ordinances as did the Court of Appeals for the Seventh Circuit in the *Mosely* case, supra.

Accordingly, we urge this Court to reverse the decision of the Supreme Court of Illinois and to rule that these Rockford ordinances are unconstitutional.

Respectfully submitted,

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